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NO. 71-1016

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

FEDERAL POWER COMMISSION,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, *et al.*
(The Collateral Proceeding)

FEDERAL POWER COMMISSION,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, *et al.*
(The Curtailment Proceeding)

MEMORANDUM OF THE PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK IN SUPPORT OF MOTION FOR EXPEDITED CONSIDERATION AND PETITIONS FOR WRITS OF CERTIORARI

Of Counsel:
EDWARD S. O'NEILL
WILNER, SCHEINER & GREELEY
2021 L Street, N.W.
Washington, D.C.

PETER H. SCHIFF
Public Service Commission for
the State of New York
44 Holland Avenue
Albany, New York 12208
General Counsel

Washington D C THIEL PRESS 202 393 0625

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The Public Service Commission for the State of New York (New York), an intervenor before both the Federal Power Commission and in the Fifth Circuit Court of Appeals in the so-called "curtailment proceeding,"[1] strongly supports the Motion for Expedited Consideration and Petitions for

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[1] The lead case in the Fifth Circuit seeking review of the Federal Power Commission's opinions in the curtailment proceeding is *Louisiana Power & Light Co., and New Orleans Public Service, Inc. v. Fed-*

Writs of Certiorari which have been filed in these proceedings by the Solicitor General on behalf of the Federal Power Commission. In New York's view only prompt action by this honorable Court can permit the Federal Power Commission to proceed with urgently needed action on a number of curtailment proceedings now pending before the Commission.

NEW YORK'S INTEREST

The Public Service Commission for the State of New York is a regulatory body established under the laws of that state to insure, *inter alia,* that New York citizens receive adequate supplies of natural gas at the lowest prices consistent with the healthy growth of the gas distribution industry. See *McKinney's Consolidated Laws of New York,* Vol. 47. Virtually all of the natural gas consumed in New York State originates in other states, in large part from Southern Louisiana and the Texas Gulf Coast, and from the continental shelf offshore the states of Louisiana and Texas in the Gulf of Mexico. From these and other areas it is then transported into New York by a number of interstate pipelines which are subject to the rate and service jurisdiction of the Federal Power Commission, some of whom in turn purchase major portions of their gas from other pipelines. As a result of this situation the Public Service Commission has found it necessary, in order to protect the interests of gas consumers in its state, to intervene and participate actively in proceedings before the Federal Power Commission relating to the pipelines serving New York and their suppliers. See, *e.g., Atlantic Refining Co. v. Public Service Commission for the State of New York (CATCO* case*),* 360 U.S. 378 (1959).

Of the six interstate pipelines presently providing gas to New York distribution companies, five, Transcontinental Gas Pipeline Corporation, Texas Eastern Transmission Com-

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eral Power Commission, Case No. 71-3429. New York's petition to intervene in that case was granted by order of Judge Coleman on January 11, 1972.

pany, Algonquin Gas Transmission Company, Consolidated Gas Supply Corporation, and Columbia Gas Transmission Company, presently have curtailment proceedings pending before the Federal Power Commission and two of these, both of which account for major amounts of gas consumed in New York, have actually found it necessary to curtail firm service to the customers in New York and other states for extended periods during the present winter heating season. In addition, curtailment proceedings are pending involving a number of other pipelines who sell large amounts of gas to the pipelines serving New York. Predominant among these other pipelines is the United Gas Pipe Line Company, the pipeline involved in the present cases, which is a major supplier of gas to Texas Eastern and Texas Gas Transmission Corporation, and through them to Consolidated Gas Supply, and Algonquin Gas Transmission. It is New York's understanding that the firm service curtailment which Texas Eastern has had to impose during the present winter heating season is the direct outgrowth of the curtailment in turn imposed on it by United Gas Pipe Line. It was for this reason, among others, that New York intervened and participated in the United curtailment proceeding before the Commission, and has intervened in the several petitions for review of the Commission's Opinion No. 606 therein which have been filed in the Fifth Circuit.[2]

ARGUMENT

It is of the utmost importance to gas consumers in the State of New York for this Court, at the earliest possible time, to pass upon the validity of the decision of the court

[2] While most of the pipelines serving New York make some direct sales (though none within New York), this is a relatively unimportant aspect of their business. However, major pipeline suppliers of the pipelines serving New York, including preeminently United, make extensive direct sales. The issue posed by the present petitions thus has an important bearing on the total amount of natural gas available to New York consumers.

below holding that the Commission lacks any authority to consider the direct sales of the interstate pipelines in passing upon the curtailment plans instituted by the pipelines in periods of gas supply shortage. As the Solicitor General's petitions point out, the opinion below is in direct conflict with prior statements of this Court stating that curtailment of service to direct customers is primarily related to transportation of natural gas "and thus within the jurisdiction of the Commission to control" *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, 322 U.S. 507, 523; see *Federal Power Commission v. Transcontinental Gas Corp.*, 365 U.S. 1, 28 (1961).

Relying on such opinions and its extensive powers over the interstate transportation of gas under Sections 4, 5 and 16 of the Natural Gas Act (15 U.S.C. §§ 717(c), 717(d), and 717(o)), the Commission over the years has handled pipeline curtailment proceedings, including questions as to the amount of gas to be made available to direct customers, under these sections. See, *e.g.*, *City of Detroit, Michigan, et al. v. Panhandle Eastern Pipe Line Co., et al.*, 6 F.P.C. 196 1947).[3] The result of the lower court's decision is thus to carve out from the Federal Power Commission's effective control in curtailment situations a major portion of the gas flowing in interstate commerce.

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[3]The suggestion of the court below that the pipeline could voluntarily vest the Commission with jurisdiction over direct sales by filing for complete or partial abandonment of its transportation service for the direct sale under Section 7(b) of the Act, is by no means a practical solution to the problem. For this leaves vindication of the public interest in avoiding discrimination to the pipeline which may be the cause of the discrimination. Nor, even assuming they had authority to do so, is this a situation in which the states where the direct sales are made would have any interest in limiting the amount of gas available for such customers in order to more fairly ration the available gas among all of the pipeline's customers in the other states. See *Federal Power Commission v. Transcontinental Gas Pipe Line Co.*, 365 U.S. 1, 28 (1961); *California v. LoVaca Gathering Co.*, 379 U.S. 366, 370 (1965).

We also concur with the views of the Solicitor General that this Court should review that part of the decision of the court below holding that the Commission has no certificate jurisdiction over certain sales United is making in Louisiana to both direct and wholesale customers under circumstances where the gas flowing in the particular lines had originally all come from intrastate sources and the amount of out-of-state gas now flowing in these lines was, in the lower court's opinion, *de minimus*. *But, cf. Federal Power Commission v. Florida Power & Light Co.*, (United States Supreme Court No. 70-38, decided January 12, 1972). In this respect we point out that the jurisdictional issue involved in this part of the case, which as the Solicitor General indicated in his brief was pending before the Federal Power Commission at the time of the lower court's opinion[4] is directly related to the basic curtailment issue. For under a number of the sales contracts involved, United has agreed to *increase* sales to such parties at the same time as it was substantially curtailing service to its other interstate customers.

Finally, we cannot urge too strongly that this Court take action to insure that the matter will be brought before it for decision during this term of court. As indicated above, consumers of gas in New York are already being curtailed and the extent of this curtailment can increase dramatically if all direct customers of the pipelines directly or indirectly serving New York are immune from Commission control over pipeline curtailment plans. Moreover, a critical period of pipeline curtailment of gas is likely to occur during the heating season commencing in November of 1972. It is imperative therefore that the basic determination as to whether the Commission's authority over pipeline curtailment practices extends to direct sales be made in time for the

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[4]Since the filing of the Motion and Writs of Certiorari, the Commission on February 9, 1972 issued Opinion 610 in *United Gas Pipe Co.*, Docket No. CP71-89, holding that it did have jurisdiction over the sales in question.

Commission to act this spring in order to provide adequate relief for the next winter heating season. This can only be accomplished if the Court is prepared to act before the end of its current term.

Respectfully submitted,

PETER H. SCHIFF
General Counsel
Public Service Commission for the State of New York

Of Counsel:
EDWARD S. O'NEILL
WILNER, SCHEINER & GREELEY
2021 L Street, N.W.
Washington, D.C.